United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,	)	
Appellee,	)	No. 23283
v.	)	
JOHN H. L. WILSON,	)	
Appellant.	)	

Appeal From The United States District Court

For The District Of Columbia

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Of Counsel:
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October 27, 1969

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STATEMENT OF ISSUES PRESENTED

Whether the constitutional requirements of due process can be satisfied when there is an in-court identification of a suspect based on a forced, one-man confrontation between witness and suspect shortly after the crime.

Whether the in-court identification of defendant in this case should be declared inadmissible because of the prejudicial and "highly suggestive" circumstances surrounding the confrontation between witnesses and defendant after the crime.

Whether §3502, Title 18 of the United States Code, which compels admission of all eye-witness identifications in a court established under Article III of the Constitution of the United States, is contrary to appellant's right to "the assistance of counsel for his defense" guaranteed by the Sixth Amendment.

Whether, under the circumstances of this case, the instruction on flight given by the trial court was prejudicial error.

REFERENCES TO RULINGS

None

[This case has not previously been before the Court.]

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UNITED STATES OF AMERICA,	)	
	)	
Appellee	)	
	)	No. 23283
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	)	
Appellant.	)	

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Judgment was entered in the District Court on June 6, 1969, finding defendant guilty of one count of assault with intent to commit robbery while armed, two counts of assault with a dangerous weapon, and a final count of carrying a deadly weapon. Defendant was sentenced to 7 - 25 years on the first count, 3 - 10 years on the two counts of assault with a dangerous weapon, and one year on the last count. These sentences are to run concurrently. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291 (1964).

STATEMENT OF THE CASE

On June 10, 1968 the defendant was arrested and, after confrontation with the two complaining witnesses at the scene of the crime, charged with

attempted robbery, assault with a dangerous weapon, and carrying a dangerous weapon. He entered a plea of not guilty. On April 17 and April 21, 1969, a trial was held in the District Court before Judge Sirica and a jury. Defendant was convicted and sentenced for a total of 7 - 25 years on the assault with intent to commit robbery while armed with a dangerous weapon, 3 - 10 years each on counts of assault with a dangerous weapon, and finally, one year on carrying a dangerous weapon.

A motion for judgment n.o.v., or in the alternative, for a new trial, was filed on April 25, 1969 and denied on May 15, 1969.

The major part of the Government's case involved the testimony of two gas station attendants -- Lewis Hockman and Roland D. Miller -- who claimed defendant attempted to rob them with a pistol.

Mr. Hockman, the first witness, testified that he was working at Hawkin's Sunoco Station, 1st & K Streets, N.E., on the night of June 10, 1968. At approximately 7:50 p.m., according to this statement, a man approached him at the station and said "This is a holdup." (Tr: 136) This man pointed a revolver at Hockman. At this point the man was only "12 - 14 inches" away, yet Hockman's description seems vague -- "5-1/2 - 6 feet tall, round face, mustache, light jacket, dark pants." (Tr: 137) Perhaps this is essentially because, as he stated on cross examination ". . . I was nervous . . . I was upset." (Tr: 149) On the above basis he pointed out the defendant in the courtroom as the person holding him up. (Tr: 138)

Hockman said he got away from the robber and ran to a nearby viaduct where he hailed a passerby, gave him a dime and asked him to call the police. (Tr: 140) At this time the robber had left the station and gone north on 1st Street to L Street. According to Hockman, who was admittedly nervous, he observed this man for the two minutes it took for the man to go out of sight (Tr: 141), but some of this time was occupied by the passerby's questions. (Tr: 149, 150), Hockman did not stop there. Ignoring the fact that the robber had a gun, he took his car off the lift, went up 1st Street in the car to L Street, turned right onto L Street, went over to 3rd Street and turned down to K Street. During this time he claimed he had the robber in his sight for 20 seconds. (Tr: 143) At that point, 3rd and K Streets, N.E., he lost sight of the robber.

Hockman returned to the gas station and a few minutes later a patrol car arrived. Hockman got into it. (Tr: 146) Hockman did not have time to tell the police where he had lost sight of the robber when another police car reported that they had picked up a suspect. (Tr: 156) Hockman said on cross-examination that the defendant was handcuffed at this time and there was no doubt in Hockman's mind that defendant was in the company of police officers. (Tr: 157) While there is conflict over what the police officer said (Tr: 160, 217-218), it was clear he wanted Hockman to come out of the station and identify the defendant who was sitting in the patrol car approximately 20 feet away. (Tr: 159) Hockman said it was the man who robbed him. (Tr: 144) He again identified the defendant as the robber when defendant was taken out

of the car while handcuffed and made to stand beside one of the policemen. (Tr: 161) He pointed defendant out in the courtroom as the man the police returned to the station. (Tr: 145)

On cross-examination, it appeared that Hockman was brought to the Court of General Sessions several days later, shown a photograph of defendant and asked to identify him. He did so. No photographs other than the one of defendant were shown him. (Tr: 167)

Miller, the other chief witness, was on duty as a part time attendant the night of June 10. The robber put a gun in Miller's stomach and asked for his money. (Tr: 189) Miller said he observed him at this time for a half-minute to a minute. Yet his description too was meager -- "rather tall, light tan jacket, dark pants." (Tr: 190) On the basis of that observation he pointed out defendant in the courtroom as the robber. Miller then ran out of the office for about 60 yards, close to where Hockman was. (Tr: 191) The robber left the station after Miller had fled. According to Miller's testimony he had five minutes to observe the robber "walk across the drive diagonally from the station over to the corner of 1st and K." (Tr: 192) He thus observed him for a second time, although he admits he had his eye on Hockman and the passerby (Tr: 191-192) for as much as two minutes of that time. (Tr: 200) A patrol car arrived approximately five minutes after the call and Miller gave them a description. (Tr: 193)

When two detectives returned with the defendant, estimated by Miller as ten minutes after the robbery, Miller testified it was the same officers

as the ones who initially arrived on the scene and who had asked Miller for a description. (Tr: 195) Yet, as the two detectives testified, they picked up defendant without talking to anyone. (Tr: 172)[1/] In any case, Miller knew defendant was in the back of a police car and knew defendant was the one he was supposed to identify. He did so. (Tr: 195) The defendant was removed from the car, the police officer again asked Miller to identify him, and Miller again identified him. (Tr: 196) Defendant was handcuffed at that time. (Tr: 204) Miller and Hockman were both there together and identified him at approximately the same time. (Tr: 207)

Detective Riggs testified that he was in plain clothes on the night of June 10 in a patrol car with Detective Hill. After hearing of the robbery at about 7:50 p.m., they headed toward the area of 1st and K and saw defendant heading south on foot on 3rd Street above H Street, N. E. They ordered him to stop. (Tr: 172) He did not. They then chased him, caught up with him, stopped him, searched him, and uncovered a revolver. (Tr: 173) Returning him to the service station, they asked Hockman and Miller to identify him. (Tr: 175)

Detective Hill's testimony was similar. (Tr: 209-214)

That in essence was the Government's case. The defense did not call any witnesses, nor did the defendant take the stand. However the defense did introduce a transcript of the police radio run of the robbery holdup. (Tr: 228)

1/ Since Miller was confused as to which police officers he spoke to, he may possibily have also been confused as to any other identifications.

SUMMARY OF ARGUMENT

The trial court should have granted defendant's motion to suppress the in-court identification of defendant by two witnesses because the identification was based on a highly suggestive on-the-scene confrontation between the defendant and witnesses shortly after the crime which was violative of defendant's right to counsel at all critical stages of a criminal proceeding. The single person "lineup" in this instance was so suggestive and inherently prejudicial that this Court is asked to rule that absent exceptional circumstances not present here which warrant immediate identification, the identifications of this type should always be pursuant to a proper lineup procedure which fully meets the requirements of procedural due process.

Even if the Court declines to make such a rule, the particular facts of the case require that the in-court identification of defendant should be excluded because of the prejudicial circumstances of a showup without counsel present. At this confrontation defendant was handcuffed, made to stand with no other possible suspect present, and with several police officers pointing him out as the suspect. A revolver was also shown at the same time. Reversal is necessary for an examination as to whether the witness' identification has a source independent of this confrontation.

Title 18, U.S.C. §3502, which on its face would compel admission of the in-court identification of the defendant in this case, is contrary to the

defendant's right to assistance of counsel for his defense, a right guaranteed by the Sixth Amendment as interpreted by the Supreme Court in United States v. Wade, 388 U.S. 218 (1967).

The trial court's jury instruction regarding flight of the defendant and the allowable inference that defendant was guilty of a criminal act is error because the court failed to explain why the jury is allowed to make such an inference and of what act or acts defendant could be guilty of by reason of his flight.

ARGUMENT

I. The In-Court Identification Of Defendant Is Inadmissible Since The Forced Confrontation Between Defendant And Witnesses Shortly After The Alleged Crime Was So Unnecessarily Suggestive As To Deny Defendant Due Process Of Law*

A. Absent extraordinary circumstances, any forced one-man show-ups between witness and suspect are so prejudicial as to be unconstitutional and per se illegal.

It is argued in the next section that under the particular facts of this case, the identification in-court by the two witnesses is inadmissible. However, prior to that, we are asking this Court to review its holdings on confrontations shortly after the occurrence of a crime and make a lineup mandatory in almost all instances.

The major case in this Circuit on confrontation of a single suspect by the witnesses shortly after the crime is Wise v. United States, 127 U.S. App.

* With respect to Point 1, appellant wishes the Court to read Tr: 159-162, 167-168, 183-185, 195-197, 203-206.

D.C. 279, 383 F.2d 206 (1967), cert denied, 390 U.S. 964 (1968). There an intruder had broken into a home and fled. One of the owners followed the intruder and police caught up with both of them. Wise, the accused, was brought back to the home where the other homeowner identified only his voice since she had not seen his face. On appeal Wise argued that the confrontation violated his constitutional rights because of lack of counsel at the confrontation. The Court stated that the Sixth Amendment argument was inapplicable since United States v. Wade, 388 U.S. 218 (1967) was not prospective in application, but it considered Wise's appeal under the Fifth Amendment's Due Process clause. It said:

> "The presentation of only one suspect, in the custody of the police, raises problems of suggestibility that bring us to the threshold of an issue of fairness. But that is generally the case with confrontations immediately after hot pursuit." 388 U.S. at 209.

The Court however did not reverse, although it indicated that if Wade were applicable, it might review the matter on a different basis. Under the circumstances in the Wise case, the Court saw no divergence from the rudiments of fair play which must govern the state in its pursuit of criminals. But the Court left one caveat:

> "It may be in a particular case there would be reason, without denying the general principle of prompt identifications, to say that the particular identification at the scene was conducted in such an unfair way that it cannot tolerably be admitted into evidence." Id. at 210

Several cases in this Circuit since then have adhered to the general principles

of the Wise decision while diverging on the particular aspects of the individual facts before it. We submit, however, that these cases did not fully consider the philosophy of Wade, supra and Stovall v. Denno, 388 U.S. 293 (1967).

In Wade the suspect was made to appear in a lineup without presence of counsel. Calling the lineup a serious and critical stage in the criminal trial, the Court pointed out the dangers of a lineup and pretrial confrontation for purposes of identification -- "It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification." 388 U.S. at 229-230. It said further that improper influences may go undetected by a suspect, guilty or not. In this regard, we should recall that in the typical confrontation of witness and suspect after the crime, there are one or two officers present, perhaps with drawn guns, a handcuffed, often disheveled suspect, and a police car. Normally the witness is excited, nervous and scared. He wants nothing to do with the accused. Where the victims are of one race and the suspect of another, there is further possibility of conspicuous unfairness in the identification. Naturally the easiest thing to do is say "that's him" and let nature take its course. It is this procedure which the Supreme Court criticized. To protect the defendant and preserve his right of meaningful cross-examination, the Court said that the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification. Id. at 235. Otherwise the defendant will often be precluded from reconstructing what occurred. To protect that constitutional right, the Court required that counsel be present at a lineup.

In Stovall v. Denno, supra, decided on the same day, the suspect was accused of robbery and murder. He was brought to the hospital bedside of one witness and identified, he being the only Negro in the room. The witness later identified him in-court. We should note at the outset that Stovall did not, like Wise, have the Wade ruling apply retroactively as far as requiring counsel at this critical stage of the criminal trial. But the Court did consider his confrontation under the "unnecessarily suggestive" standard of the Fifth Amendment.

The Supreme Court did not reverse, saying the totality of the circumstances in the case did not violate due process requirements. They mainly relied on the fact that the witness could not leave her bed and may not have lived, in admitting her testimony into evidence. The implication of their ruling, however, left little doubt that pretrial confrontations without counsel are suspect and there should be imperative reasons for such procedure. We suggest that there are few such emergencies and as explained later, these should be sharply limited to exceptional circumstances.

One of the leading cases in this Circuit involving a post-Wade confrontation with a single witness is Russell v. United States, ___ U.S. App. D.C. ___, 408 F.2d 1280 (1969). There a witness saw a man emerge from a shoe-shine shop at 5:00 a.m. On his reporting the incident, the police picked up Russell in the vicinity and drove him back to the shop where he was identified. In interpreting Wade, Chief Judge Bazelon cast some serious doubts on this type of confrontation. He spoke for the Court in saying:

> "Unquestionably, confrontations in which a single suspect is viewed in the custody of the police are highly suggestive. Whatever the police actually say to the viewer, it must be apparent to him that they think they have caught the villain . . . There may also be unconscious or overt pressures on the witness to cooperate with the police by confirming their suspicions. And the viewer may have been emotionally unsettled by the experience of the fresh offense." (408 F.2d 1280 at 1284)

Yet the Court refused to reverse, feeling that the prompt confrontation had the advantage of promoting fairness by assuring reliability. The Court admitted the witness' testimony into evidence with some hesitation.

We ask this Court to reconsider that ruling. While there are advantages to immediate confrontation after a crime, the disadvantages of a single suspect showup are so prejudicial as to warrant a per se exclusion rule of in-court identification based on such a confrontation except in extraordinary circumstances. An example of such an extraordinary circumstance is where the victim is dying. One expert has said that the presentation of a single suspect to a witness constitutes the most grossly suggestive identification procedure ever used by the police.[1/] According to this same expert, handcuffing appears to make it worse,[2/] and he criticizes the pointing out of the suspect to the victim by the police. Some tests show that clothes are more easily identified than the victim[3/] and if police pick up a similarly dressed suspect, this, together with the other suggestive circumstances of the confrontation, may be enough to identify the wrong suspect.

1/ P. Wall, Eye-Witness Identification In Criminal Cases (1965) at 28.

2/ Id. at 30.

3/ Id. at 31.

In Bates v. United States, ___ U.S. App. D.C. ___, 405 F.2d 1104 (1968), the Court allowed an in-court identification based on a confrontation shortly after the crime, but said:

> "Prudent police work would confine these on-the-spot identifications to situations in which possible doubts as to identification needed to be resolved promptly; absent such need the conventional line-up viewing is the appropriate procedure." (405 F.2d at 1106.)

We might ask at this juncture whether there was any doubt in the officers' mind in the instant case as to whether they had the right man. It appears that it is customary to have an automatic return to the scene of the crime in all instances, regardless of the sureness of the police's identification. What then do the quoted words mean in Bates? Is there ever a case where a return to the scene is unnecessary, and that the witness can wait an hour or so later to identify the suspect. We think so. We suggest that that should be the standard, except where there is genuine doubt as to the identity of the suspect (which should be shown at the pretrial hearing to suppress), or if, as we noted, the victim is in serious physical condition and may not be able to identify the suspect at a later date. In all other cases, if this Court is to carry forward the genuine spirit of Wade and Stovall, it should require the officers to have a lineup with counsel present to guarantee that all defendant's rights are preserved. We also suggest that counsel need not be present at all such lineups. The Supreme Court has stated in Stovall that counsel need not be present at all lineups if conducted ". . . with scrupulous fairness and without prejudice to the accused at trial." 388 U.S. at 299.

A lineup could be held on short notice, perhaps set up by radio call, and the inquiry could be completed within 30 to 60 minutes. This would leave time for the police to again scout the area if the victim is unable to identify the suspect. Such cases would be rare because our rule would go into force only where there is little doubt in the officers' mind that they have the right suspect. If they are truly doubtful, then a confrontation could be allowed subject to a check of the officers' veracity on a motion to suppress prior to trial time.

B. Under the circumstances of this single lineup confrontation, defendant's identification at the scene was so unnecessarily suggestive as to require reversal for an examination of the independence of the in-courtroom identification of defendant.

We have asked in the first part of this argument that all single person confrontations be held illegal. If the Court declines to adopt such a rule, we ask then that the Court consider the circumstances of this particular confrontation and require a new trial in which the in-court identifications must have a source independent of the confrontation.

In the trial the following circumstances of the confrontation appear. The plainclothes officer asked Lewis Hockman, one of the gas station attendants, if he could identify the man. Hockman did so when the defendant stood near the plainclothesman and the handcuffs were evident. (Tr: 157) He knew it was the man the police suspected had committed the attempted robbery. (Tr:

157) At the same time, the policeman showed Hockman a pistol he had in his possession. (Tr: 157) Other police officers and two patrol cars were present at the same time. (Tr: 161)

Roland Miller, the other gas station attendant, identified defendant upon police request while defendant was in the back of the police car at a distance of 5 - 10 feet. (Tr: 175) Both he and Hockman identified the man together (Tr: 205) while a gun was being shown to them and Miller admitted there was a lot of excitement at the time. (Tr: 205)

We submit that such a confrontation creates too great a chance for an erroneous conviction. As Chief Judge Bazelon said in Wright v. United States, ___ U.S. App. D.C. ___, 404 F.2d 1256 (1968),

> "The clear thrust of Stovall is that, without justifying circumstances, a one man showup is too unnecessarily suggestive to satisfy due process. A lineup must be conducted unless it will necessitate a delay which is unlikely to make identification impossible or less reliable." (404 F.2d at 1262) (Dissent)

There is no showing that a lineup could not have been conducted that evening. Identification would have been possible, and hardly less reliable than this confrontation. Why expose defendant to the unnecessary dangers of this confrontation?

We would like to emphasize the prejudicial factors of this confrontation, using much the same checklist that the District Court did in United States v.

O'Connor, 282 F.Supp. 963, 965 (D.D.C. 1968).[1] The suspect was alone and there was no one else to compare him to.[2] A revolver similar to the one described by the two attendants was shown at the same time.[3] There was mutual reinforcement by the two witnesses, possibly leading to the wrong conclusion as to identify. Both witnesses were admittedly nervous. (Tr: 149, 198), a factor which could have disturbed their accuracy.

1/ "1. Was the defendant the only individual that could possibly be identified as the guilty party by the complaining witness, or were there others near him at the time of the confrontation so as to negate the assertion that he was shown alone to the witness?

"2. Where did the confrontation take place?

"3. Were there any compelling reasons for a prompt confrontation so as to deprive the police of the opportunity of securing other similar individuals for the purpose of holding a line-up?

"4. Was the witness aware of any observation by another or evidence indicating the guilt of the suspect at the time of the confrontation?

"5. Were any tangible objects related to the offense placed before the witness that would encourage identification?

"6. Was the witness' identification based on only part of the suspect's total personality?

"7. Was the identification a product of mutual reinforcement of opinion among witnesses simultaneously viewing defendant?

"8. Was the emotional state of the witness such as to preclude objective identification?

"9. Were any statements made to the witness prior to the confrontation indicating to him that the police were sure of the suspect's guilt?

"10. Was the witness' observation of the offender so limited as to render him particularly amenable to suggestion, or was his observation and recollection of the offender so clear as to insulate him from a tendency to identify on a less than positive basis?

"Other factors will also be significant in a particular case." (Footnotes omitted)

2/ This factor was a key point in the Wade decision, requiring counsel to be present at lineups.

3/ This has been criticized. See United States v. O'Connor, 282 F.Supp. 963 (D.D.C. 1968)

While there were evidently no prejudicial statements made to the witnesses by the police which would have indicated to them that the police were sure of the suspect's guilt, we have almost the same result due to the handcuffs and the officer requesting that Hockman and Miller identify defendant.[1/] Additionally, the witnesses were white and the defendant a Negro, introducing the possible difficulty of identifying a person of another race.

Based on the above list, there appear to be a number of factors which, taken as a totality, create extremely prejudicial circumstances which almost insure that defendant would be identified. Some of these factors could have been eliminated in a lineup. For example, the suspect would not be alone, the handcuffs would be gone, there would be no mutual reinforcement by both witnesses, no revolver and possibly the nervousness of the two witnesses would have ebbed by that time.

It is the law in this Circuit that if the circumstances of the pre-trial confrontation are unduly suggestive, the burden of proof shifts to the Government to show, by clear and convincing evidence, that the in-court identification had an independent source. Macklin v. United States, ___ U.S. App. D.C. ___, 409 F.2d 174, 177 (1969) citing Clemons v. United States, 131 U.S. App. D.C. ___, 408 F.2d 1230 (1968) (en banc). Since we have asserted that the above circumstances are unduly suggestive, we must now look at the in-court identification without that confrontation. Pross v. United States, ___ U.S. App. D.C.

1/ A critical factor which the Court in United States v. Trivette, 284 F. Supp. 720, 723 (D.D.C. 1968) used as one reason for excluding an in-court identification.

___, 408 F.2d 1297 (1969); United States v. Trivette, 284 F.Supp. 720, 723 (D.D.C. 1968). Under the rigid standards of Chapman v. California, 386 U.S. 18, 24 (1967) this Court must find that the constitutional error of this in-court identification can be declared harmless beyond a reasonable doubt. We do not think this standard can be met in the instant case.

From testimony it is clear that Lewis Hockman had the most time to observe the robber. He saw the robber for four or five seconds while the robber was holding him up. (Tr: 137) Hockman also saw the robber cross the street and go up the street. He claims this took the robber two minutes, a rather long time considering the length of the street and Hockman's preoccupation with the passerby. (Tr: 149-150) In any case, Hockman's final, brief look took place from a car in which he followed the armed robber down the street. He claimed he saw the suspect for 20 seconds at that time. (Tr: 142)

We do not know, and the transcript is unclear whether Hockman could have made his identification without the benefit of the illegal confrontation. At the very least this should have been explored below. Granted, Hockman did identify defendant in the court as the one who held him up. (Tr: 138) However, what is unknown is to what extent this in-court identification was based on the illegal confrontation and not solely on the observations at the scene of the robbery. Also, testimony at trial indicates Hockman had an additional opportunity to reinforce his identification by being shown

a single photograph of defendant several days after the arrest. (Tr: 167) Under the ruling in Simmons v. United States, 390 U.S. 377 (1968), there is serious doubt as to the constitutionality of such a procedure and we suggest that Hockman's testimony must be re-examined so that the identification of the defendant is based solely on what occurred at the time of the holdup. See also Young v. United States, #21504 (D.C. Cir., Jan. 24, 1969).

Miller had much less opportunity to observe defendant, and his testimony is accordingly less relevant. He did identify defendant in court as the one who held him up. (Tr: 190) However, he was nervous (Tr: 198A) and there were distractions during his initial observation (e.g., watching passerby call to police (Tr: 191)). We do not know if his in-court identification rested solely on this observation or mainly on the later confrontation when defendant was returned to the scene of the crime. We do know he had made another error in observation when he identified the wrong policeman as the one who returned defendant to the gas station. (Tr: 194-195) We think that his initial identification should have been separated and analyzed for its independence from the confrontation.[1/] This was not done.

Where this type of prejudicial confrontation takes place, we submit that the rule laid down in Wade is applicable:

> "We do not think this disposition [exclusion of the in-court identification] can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification." 388 U.S. at 240.

1/ See his direct testimony on this, Tr: 189-190.

The Government in the first trial failed to clearly examine either witness on the accuracy of their first observations of the witness and to separate this testimony from that of the illegal confrontation. There is no alternative but to remand for a new trial, in which the confrontation identification must be eliminated and the Government be given an opportunity to establish by clear and convincing evidence that the in-court identification is not the result of the earlier, illegal, confrontation.

C. Title 18 U.S.C. §3502, is contrary to defendant's right to counsel guaranteed by the Sixth Amendment under the ruling of United States v. Wade.

Title 18 of the United States Code was amended June 19, 1968 by the addition of §3502.[2/] This section purports to compel admission of the complaining witness' testimony that the defendant was the man who committed the crime, regardless of whether such an in-court identification would be the result of an improper lineup procedure. This section, the defendant must admit, was specifically designed to overrule United States v. Wade, supra. Senate Report No. 1097[2/] states:

> "The use of eyewitness testimony in the trial of criminal cases is an essential prosecutorial tool. The recent case of United States v. Wade [cite], struck a harmful blow at the nation-wide effort to control crime . . . . It is incredible that a victim is not permitted to identify his assailant in court . . . . Nothing in the Constitution warrants it. To counter this harmful effect, the committee adopted that portion of Title II providing that eyewitness testimony is admissible in criminal prosecutions brought in the Federal courts . . ."

1/ 18 U.S.C. §3502 reads in full:

> "The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under Article III of the Constitution of the United States."

While the defendant admits this was the intent of Congress, he cannot agree that "[n]othing in the Constitution warrants" the protection afforded his basic rights by the Wade decision. Since the rule laid down in Wade is found to have its source in the Constitution, the only way to "counter" that rule is by Constitutional amendment, for as the Supreme Court recently stated in Miranda v. Arizona, 384 U.S. 436, 491 (1966), "Where rights securred by the Constitution are involved, there can be no rule making or legislation which would abrogate them." Section 3502 ignores this principle; this Congress may not do.

It is abundantly clear that the principles of Wade are grounded in the Supreme Court's interpretation of the appellant's Sixth Amendment right to "Assistance of Counsel for his Defense". Of this fact, the majority, the dissent, and, indeed, even the author of §3502 [1] are all in agreement.

The majority in Wade [2] traces recent developments in the Court's efforts at giving meaningful content to the Sixth Amendment right to counsel in recognition of the fact that:

1/ Senator Ervin stated in debate on §3502:
"On June 12, 1967 . . . the Supreme Court . . . held . . . that it was unconstitutional for an eyewitness of a crime to be permitted (sic) the suspect was present." S.Rep. 1097, 90th Cong. 2d Sess. 29 (1968) (Emphasis added).

2/ See, 388 U.S. at 224-227.

> "When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceeding where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings." 388 U.S. at 224 (Footnote omitted) (Emphasis added).

Starting with Powell v. Alabama, 287 U.S. 45, 57 (1932), the Court realized that the period between arraignment and trial was "perhaps the most critical period of the proceedings."

In recognition of this the Court has required the assistance of counsel at the type of arraignment where certain rights might be lost. Hamilton v. Alabama, 368 U.S. 52 (1961). The Court excluded incriminating statements made by the defendant at a meeting between the defendant and an accomplice turned informant arranged by Federal agents without the notice to defendant's counsel. Massiah v. United States, 377 U.S. 201 (1964).

The Massiah and Hamilton principle was further extended into "gatehouse" proceedings in Escobedo v. Illinois, 378 U.S. 478 (1964), which required counsel's presence prior to arraignment when the investigation began to focus on the accused. And finally in Miranda

v. Arizona, supra, counsel was required at "custodial interrogations", absent an "intelligant waiver".

The court in Wade concluded from this line of cases that:

> "[T]he principle of Powell v. Alabama and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." 388 U.S. at 227.

The issue raised in Wade was whether:

> "The assistance of counsel at the lineup was indispensable to protect Wade's most basic right as a criminal defendant -- his right to a fair trial at which the witnesses against him might be meaningfully cross-examined." 388 U.S. at 223.

Thus, the Supreme Court, with certain qualifications discussed below, held counsel was "indispensable". We of course have suggested it is indispensable at pre-lineup confrontations, which creates a conflict between such rule and §3502.

There is however one alternative to declaring §3502 unconstitutional and avoiding a requirement of counsel at all preliminary stages. This is to decide that counsel need not be present at a lineup or other critical pre-trial stage if all requirements of due process are met. Such a construction would avoid declaring §3502 completely unconstitutional, yet certainly create exemptions to its blanket admissibility where due process requirements are not met. We are asking this Court to construe §3502 so that it can allow testimony to be admitted even if counsel is not present, but only where it can be shown that the

accused will not be prejudiced at a later trial. As we have suggested earlier, the standard of due process has not been met in the instant case.

There appears to be only three qualifications to the Wade requirement of counsel. The present case does not fit under any one of them.

One is that the appellant may by "intelligent waiver" refuse the assistance of counsel. There is no basis in the record for concluding the appellant so waived his rights.

The second is that an improper lineup may be rendered "harmless error" by "clear and convincing" proof that the in-court identification of the accused had an "independent origin". As demonstrated in the previous section of the appellant's argument, the Government failed to carry its burden in this regard.

And finally, the Court stated:

> "Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the bases for regarding the stage as 'critical'. But neither Congress nor the federal authorities have seen fit to provide a solution. What we hold today 'in no way creates a constitutional straight jacket which will handicap sound efforts at reform, nor is it intended to have this effect.' Miranda v. Arizona, supra, at 467 . . . ." 388 U.S. at 239 (Emphasis added).

So far Congress has yet to provide that solution. In addition there is no indication in the record that the defendant's pretrial confrontation was conducted

by the authorities in a manner designed to be effective in eliminating the "risks of abuse and unintentional suggestion." Unless and until Congress or federal authorities (or State or local governments in their respective jurisdictions) "provide a solution," pretrial confrontations remain a "critical stage." And as the Supreme Court construes the meaning of a defendant's Sixth Amendment right to "Assistance of Counsel for his Defense", a defendant must have the right to such counsel at every such "critical stage" of a criminal proceeding, or as it stated in Stovall, meet all the requirments of due process. 388 U.S. at 299

Far from even attempting to "provide a solution", Congress by enacting §3502 has declared, in effect, that there is no due process problem. Congress has declared that the Constitution does not mean what the Supreme Court says it means, that a criminal defendant has no right to counsel at pretrial confrontations -- whether other safeguards are provided or not, whether the defendant requests counsel or not, and whether the lineup is harmful to a fair trial or not. One need only repeat:

> "Where rights secured by the Constitution are involved, there can be no rulemaking or legislation which would abrogate them." Miranda v. Arizona, 384 U.S. at 491.

It is beyond question that the Supreme Court has the power and duty to interpret the meaning of and give substance to the rights guaranteed by the Constitution. In the exercise of that duty in Wade, the Supreme Court offered workable guidelines for balancing the needs of enforcement and

the rights of persons accused of crime.[1/] If there is fault to be found it is not with the Wade decision, but with the broad rights guaranteed to criminal defendants by the Sixth Amendment. If it is Congress' judgment that in 1969 persons accused of crime are not entitled to the broad protection thought necessary when the Bill of Rights were added to the Constitution, then Congress has recourse to the same method used then, the only method available then and now -- Constitutional Amendment.

II. The Trial Court's Jury Instruction On The Flight Of The Defendant After The Crime Was Prejudicial Error *

In the instructions given to the jury, the trial court gave the following instruction on flight by the defendant:

> "Now flight by a defendant after a crime has been committed does not in and of itself create a presumption of guilt, however, the jury may consider evidence of flight by a defendant as tending to prove his consciousness of guilt. You are not required to do so, however; you should consider and weigh evidence of flight by a defendant if you find he did flee in connection with all the other evidence in the case and give it such weight as in your judgment it is fairly entitled to receive." (Tr: 247)

The above instruction was strongly objected to by trial counsel for defendant before the jury retired. (Tr: 256) The judge overruled his

* With respect to Point II, appellant wishes the Court to read Tr: 170-173; 210-212; 247; 256

1/ The majority stated at 238: "In our view counsel can hardly impede legitimate law enforcement, . . . [he] cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice.

objections. (Tr: 256) Yet, an instruction quite similar to this has been called erroneous by this Court in Austin v. United States, #22,044 (D.C.Cir., May 27, 1969). We submit that such an instruction is prejudicial enough to be reversible error.

Testimony in the trial as to defendant's flight shortly after a crime was committed at the gas station shows clearly that many reasons could have existed for defendant not wishing to stop when asked to do so. We ask the Court to recall that it was evening, the situs was the inner city, and the police officers who asked defendant to halt and later testified he did not, were dressed in plain clothes and drove up in an unmarked car. (Tr: 171-172) Detective Hill on direct examination said he saw defendant, asked defendant to stop, and identified himself as a police officer. (Tr: 210) However, it does not appear that Detective Hill displayed a badge or any other emblem of his office. Defendant was running down 3rd Street at the time and merely went by the two plainclothes officers. Appellant submits that under these circumstances it is not surprising that defendant did not stop for a man jumping out of a car at night. For these reasons and because the flight took part several blocks away from the gas station, we do not think a flight instruction was proper under these circumstances.

Even if giving a flight instruction at all was not clear error, the trial court's failure to accompany it with a fuller explanation of the variety of motives which might prompt flight was erroneous. For example, assume defendant knew his possession of a gun was illegal. A police officer asks him to halt and he continues to run. We infer guilt. But of what act is he guilty? The carrying

of a gun, or something else that the police officer might have in mind. We do not know. Presumably neither does the jury, but the instruction leaves them free to imagine that flight itself is an indicium of guilt, so that the fact of flight supports an inference of guilt of any crime for which the officers wanted defendant in custody.

In Miller v. United States, 116 U.S.App.D.C. 45, 320 F.2d 767 (1963), a flight instruction was involved in which the trial court had said flight raises a presumption of guilt. The Court, through Judge Bazelon, criticized that instruction saying "fuller instructions should, when requested, be given in appropriate future cases" (770). While the jury in this case was not instructed as to flight giving a presumption of guilt, the discussion of flight and its relation to guilt in the Miller case is instructive. Judge Bazelon noted that many courts have criticized the assumption that "one who flees shortly after a criminal act is committed or when he is accused of committing it does so because he feels some guilt concerning the act." 320 U.S. at 770. Judge Bazelon goes on to note that even if the accused feels guilty, many commentators including Sigmund Freud would say there may be no relation between the feeling of guilt and the guilty act itself. Freud cautioned "You may be led astray . . . by a neurotic who reacts as though he were guilty even though he is innocent." In other words, it is possible that feelings of guilt may be present even if actual guilt is not. 320 F.2d at 772.

Appellant submits, on the basis of this record, that if the defendant actually fled police officers he had ample reason to, aside from the attempted robbery. However, the trial court's instructions on this are so vague as to leave the jury in doubt as to what exactly to infer from the flight. For

example, there is this part of the trial court's instruction -- ". . . the jury may consider evidence of flight by a defendant as tending to prove his consciousness of guilt." Guilt as to what? Any crime, or the one for which the police officers arrested him for? Judge Wright for the Court in Austin v. United States, supra, criticized instructions quite similar to those given in the instant case. He cited several Supreme Court cases (discussed herein) for the proposition that evidence of flight is a very weak inference of guilt. According to the Austin Court, "flight instructions should be used sparsely and when used, should be accompanied by a fuller explanation by the judge of the variety of motives which might prompt flight . . ." (Slip Opinion, p. 4) Assuming any flight instruction should have been given at all, this is exactly what the trial court should have done here but did not do. There should have been some explanation of the relationship between flight and guilt which would be necessary before any inference of guilt could be made.[1/] Also, there should have been included the kinds of guilt which might be infered from flight and some reference to other reasons why the defendant may not have halted.

This argument is supported by the Court's opinion in Bailey v. United States, #21,428 (March 7, 1969). There Judge Robinson for the Court said:

> "With cautious application in appreciation of its innate shortcomings, flight may under particular conditions be the basis for an inference of consciousness of guilt. But guilt, as a factual deduction, must be predicated upon a firmer foundation than a combination of unelucidated

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1/ See Miller v. United States, supra, p. 770, fn. 6, quoting Wigmore: "There are two processes or inferences involved -- from conduct to consciousness of guilt, and then from consciousness of guilt to the guilty deed."

> presence and unelucidated flight. Here there was no evidentiary manifestation that the appellant was prompted by subjective considerations related in any wise to the crime. Moreover, as the evidence disclosed, appellant had several convictions prior to the affair in suit, and these might well have dictated what seemed to him to be best. Absent anything more, there was no more basis for attributing his flight to complicity in the robbery than to a purpose consistent with innocence." (Slip Op., p. 9)

Accordingly, appellant contends that where there are other reasons for flight, either the flight instruction should not be used, or else if used, its use should be accompanied by a fuller explanation of the variety of motives which might prompt flight than that given by the trial court.

Several Supreme Court cases cast doubt on the efficiacy and propriety of such an instruction going as far back as Hickory v. United States, 160 U.S. 408 (1896). There the Supreme Court questioned a trial court's instructions concerning concealment and flight after a serious crime. In discussing the instruction the Court said " . . . acts of concealment by an accused are competent to go to the jury as tending to establish guilt -- yet they are not to be considered as alone conclusive . . . they are mere circumstances to be considered and weighed in connection with other proof with that caution and circumspection which their inconclusiveness when standing alone requires." (420) Unfortunately the instructions in the instant case do not allow the jury much room for other considerations as to why defendant fled.

Much the same issue was raised in Wong Sun v. United States, 371 U.S. 471 (1963). There a suspect had been arrested at his laundry on a

narcotics violation. The officer had failed to secure an arrest warrant. Defendant refused to admit the police officer and in fact fled down the hall to his living quarters. The Government argued in the trial that his arrest was justified, partly because his flight corroborated their suspicions that he was a narcotics agent. However, at no time did the officer state his mission and as it turned out, the Federal agents were acting on rather skimpy information. Pointing out that there were no extraordinary circumstances justifying non-disclosure of the mission, the Court said:

> ". . . when an officer insufficiently or unclearly identifies his office or his mission, the occupant's flight from the door must be regarded as ambiguous . . ." 371 U.S. 482

and added:

> "a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked." 371 U.S. at 484.

We are not contending that probable cause did not exist for arrest in the instant case. But if the foregoing reasoning of the Supreme Court is applied here, it leads to the result that defendant's conduct was ambiguous when the police car halted, hence speculation as to his motives for running could only lead to prejudicial results for the defendant unless such instructions are highly qualified. The instruction by the court below implies that if the jury found that defendant fled they can infer guilt from that act. This is incorrect since the guilt, if there was any, could stem from many acts. In Wong Sun, the facts of the illegal arrest were excluded. In the present case,

the Court is urged to exclude the instruction concerning flight from instructions in a new trial. It should not be mentioned. If the Court is not willing to so hold, we suggest it remand with instructions to amplify the guilt instruction so that the jury may not take defendant's reluctance to stop as an inference of guilt of the attempted assault without serious qualifications.

In the Hickory opinion, supra, the Court suggests we take a look at the flight out of the context of the crime for which he is accused and test its probity by that step. In our case defendant is running down 3rd Street, N. E. He is hailed by a plainclothesman, told to stop, and told also that the plainclothesman is a police officer. He continues on. He is four blocks from the site of the robbery. Based on that the jury is asked to take the flight factor into account, and allow guilt of the robbery and assault to be inferred from it. We think this is highly prejudicial.

In the context of this case, the flight of the defendant (for whatever reason) cannot be considered minor. It put a heavy weight on the guilty side of the scales of justice, bolstering the testimony of the two detectives that they had in fact caught the guilty suspect because he was running when apprehended and sought to run from them. Since their testimony played a key part in this trial, a remand should occur so that the jury may put the fact of flight into its proper context.

CONCLUSION

Appellant respectfully requests this Court to reverse the decision of the Court below, and remand this case for a new trial, for the reasons given.

/s/ Philip A. Fleming

Philip A. Fleming
Attorney for Appellant
(Appointed by this Court)

October 27, 1969

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1969
NO. 23283

UNITED STATES OF AMERICA,

v.

JOHN H. L. WILSON,

Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of October, 1969, served a copy of the brief for appellant in the above-entitled case upon counsel for appellee by personally delivering a copy to the office of

Thomas A. Flannery, Esq.
United States Attorney
United States Courthouse
Washington, D. C. 20001

/s/ Philip A. Fleming

Philip A. Fleming
Counsel for Appellant
(Appointed by this Court)

October 27, 1969

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	
v.	)	No. 23283
JOHN H. L. WILSON, Appellant.	)	

Appeal from the United States District Court
for the District of Columbia

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By Appointment of this Court

December 29, 1969

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CITATIONS

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*Cases chiefly relied on are marked by asterisks.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	No. 23283
v.	)	
JOHN H. L. WILSON, Appellant.	)	

REPLY BRIEF FOR APPELLANT

I. The Wade ruling requiring counsel to be present at all lineups should be extended to all confrontations between witness and suspect.

Defendant has argued in his initial brief filed in this case that the ruling in United States v. Wade, 388 U.S. 218 (1967), that counsel be present at all post-indictment lineups, should be extended to one-man showups occurring shortly after a crime. The Government has argued in its brief that to extend Wade to that stage of the criminal process would both (1) hinder the police in their investigation and (2) lessen the reliability of the eyewitness identification (Government brief, pp. 6-10). We submit that neither reason relied upon by the Government has merit.

This Court has thus far declined to require counsel at that stage of the proceedings.

In Clemons v. United States, __ U.S. App. D.C. __, 408 F.2d 1230 (en banc) (1968) this Court first interpreted Wade and its companion case Stovall v. Denno, 388 U.S. 293 (1967) and decided that a hearing should be held by the trial judge to decide with respect to post Stovall pretrial identifications whether, under all the circumstances of the case, the defendant's right to due process has been violated. 408 F.2d at 1237. Later, under facts similar to those in the instant case, the Court in Russell v. United States, __ U.S. App. D.C. __, 408 F.2d 1280 (1968), while criticizing such confrontations, allowed this type of identification to be admitted. It did require a Stovall type hearing, but did not require counsel to be present at one-man confrontations shortly after a crime. In this case, we are asking this Court to extend its present ruling and require counsel to be present at all confrontations, unless there are emergency situations which do not allow delay (e.g., witness or suspect seriously injured).[1/]

We feel such a per se rule is necessary for many of the same reasons that the Wade Court required counsel to be present at all post-indictment lineups. In Wade, the Supreme Court refused to accept the Government's argument that a lineup was a mere preparatory step in the gathering of

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1/ In this reply brief we do not further discuss the issue whether defendant's right to due process, under the Clemons standard, has been violated. We have argued in our initial brief (pp. 13-19) that under the totality of circumstances regarding defendant's return to the scene of the crime, defendant's rights were so prejudiced that a remand is necessary to determine the independence of the witnesses' in-court identifications.

evidence. The Court ruled that the lineup was a major step in the criminal process and pointed out why counsel is so necessary:

> "... the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known... Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus this susceptibility to suggestion the greatest." 388 U.S. at 228.

Reconstruction of this confrontation at the trial, which as the Government pointed out, is now the standard procedure for one-man showups, did not convince the Wade Court that it is an effective tool for preventing a miscarriage of justice. That Court said that counsel can often avert prejudice at lineups, thus assuring a meaningful trial. We submit that this same reasoning applies to one-man showups, where the circumstances are invariably prejudicial. Often the light will be poor, the police will have guns drawn, the defendant will be handcuffed and the witness will be upset. Much of this can be eliminated by a lineup. The countervailing arguments, which are discussed herein, infra, are not strong enough to outweigh defendant's need for greater protection.

Certainly both Wade and Clemons demonstrate that the presence of counsel is desirable if the arguments against it are not great. We then reach the question, is there an alternative to bringing the defendant back to the scene of the crime? We submit that there is.

The Government had stated that the reliability of eyewitness identification is not enhanced by delay, and that it has not been shown that fear weakens a witness' ability to identify a suspect. (Government brief, p. 8). However, this misses the thrust of Wade. Serious prejudice can result from that initial confrontation, and in fact, eyewitness identification can be made more reliable by standardizing the conditions under which it is made. In that way, we protect the defendant's rights not to be identified under worse circumstances than he would be if arrested only a day or two later. We do not think, nor has it been shown, that an hour's delay would weaken an eyewitness' ability to identify a suspect. Furthermore, immediate confrontation after a crime is probably not as common as an arrest hours or days later, and no proof has been shown that identifications are not made in those cases. Thus a delay of one hour or so has little significance.

Defendant's assertion that a witness' nervousness may result in an improper identification has been misconstrued by the Government. The Government points out that it has not been shown that fear weakens a witness' memory (Government brief, p. 8, fn. 10). We are not concerned here about a witness' ability or inability to remember the incident due to fear. We are concerned, however, about his initial nervousness, when he has not calmed down, when his heart is still "pounding", and when he is still very upset. He may identify the wrong person, not because of bad memory, but because he is upset. With an hour's delay, and in the calmer atmosphere of a lineup, he should be better prepared to identify a suspect. At the same time, the suspect's rights are better protected, with no lessening of the witness' ability to identify him.

The Government also relies on the argument that if confrontation immediately after a crime is allowed, then the police can continue the search if the witness cannot identify the suspect. While appealing, we submit that there are few cases where this will be necessary. First, if the police are quite positive that they have the right suspect, then, as this Court advised in Bates v. United States, _____U.S. App. D.C.____, 405 F.2d 1104, 1106 (1968), there should be a conventional lineup as soon as possible. Assuming the police have done their job, the suspect will undoubtedly be identified. Secondly, if there is some doubt as to whether the police have the right man, then common sense would dictate that the police continue their investigation, while others arrange a lineup for this suspect. Of course, when there is a doubtful case, then the arguments for a lineup become quite strong. Any prejudicial circumstances might tip the balance against the defendant, and his counsel may be unable to question the identification at trial. For example, assume that the identification as to height and build does not fit the witness' identification, but race and clothes do fit. In this doubtful situation, to take the suspect back to the scene of the crime, with all the prejudicial aspects of such a return, may result in a wrong identification. On the other hand, if a lineup is arranged, all that has been lost--at most--is the cost of an additional search for an hour by police, which possibly could result in an arrest of the right suspect if the witness fails to identify the first suspect.

Defendant concedes that requiring counsel to be present al all such confrontations (absent special circumstances) is not now the law in this Circuit. In Jackson v. United States ___U.S. App. D. C.___, 412 F.2d 149 (1969), in a situation where the witnesses identified the suspect in the latter's hospital room, the Court through Chief Judge Bazelon, said "we are loath to encourage or tolerate individual confrontations such as occurred here." Still, rather than establishing a per se rule, which would end all such confrontations, the court retained the due process hearing established by Clemons. Yet there are sound policy reasons for establishing a per se rule requiring that counsel be present. Police investigation is not hindered and eyewitness identification should be as accurate if a lineup is held quickly, with substitute counsel if necessary.[2/] Again we return to Wade and its analysis of due process for the reasons why counsel should be present at lineups. There, the Court said:

> "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree or suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." 388 U.S. at 228.

2/ Counsel at the lineup need not be the counsel that the suspect may initially desire, since the policy reasons favoring an immediate lineup override the right to choice of counsel. This has been approved by implication by the Supreme Court in U.S. v. Wade, 388 U.S. at 237, fn. 27 (1967).

In effect, such pretrial identification may preclude a fair trial by affirming a witness' identification (right or wrong) which cannot be challenged later.

II. Title 18 U. S. C. §3502, making all in-court identifications admissible, violates defendant's right to counsel and right to due process guaranteed by the 5th and 6th Amendments.

The Government in its brief (p. , fn. 14) states that Title 18 U. S. C. §3502 (reproduced below)[3/] is not an issue in this case, both because it was not raised by defendant below and because the identifications of the witnesses were admitted according to the due process standards of this Court. However, if this Court establishes a rule holding all identifications based on "one-man" showups inadmissible, it must then interpret §3502. Even if the Court refuses to establish the per se rule proposed herein, it will have to judicially review the constitutionality of §3502 since defendant has also asked the Court to rule the in-court identification inadmissible on the particular circumstances of this case. (Appellant's Initial Brief, pp. 13-19).

We do not think defendant need have raised the issue of §3502 at the trial below, since the trial court allowed the testimony in on another basis. The issue of §3502's constitutionality arises only if the trial court rules the identification inadmissible, except for §3502.

3/ 18 U. S. C. §3502 reads in full:
"The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under Article III of the Constitution of the United States."

We have fully argued the issue of §3502's constitutionality in our initial brief (pp. 19-25), but we do wish to stress one point. If this Court establishes a per se rule governing one-man showups, then it must face the constitutional issue directly. Since we have asked for a per se rule governing these one-man confrontations, we see no choice but to rule §3502 unconstitutional under the reasoning suggested in our initial brief. Thus, §3502 is very much in issue and deserves full attention.

However, if the Court declines to make such a ruling, but does declare that the particular circumstances here require a new trial to test the independence of the in-court identification (as suggested in our initial brief, pp. 13-19) then it need not rule §3502 unconstitutional. However, it must qualify and limit §3502's use to situations where all the standards of due process as enunciated by the Supreme Court in Wade, are met. Section 3502 by itself establishes no due process procedural safeguards governing eyewitness identifications. To fill in this gap, the Court could substitute due process standards, and while not requiring counsel at one-man showups, analyze the source of all in-court identifications by such due process standards. This is presently the law in the District of Columbia. See Clemons v. U. S. and Russell v. U. S., supra.

III. The Austin decision, holding that a flight instruction such as given below is erroneous, should apply retroactively to cases on direct appeal.

The Government has argued in its brief (pp. 11-13) that the recent decision in Austin v. United States, ___ U.S. App. D.C. ____, 414 F.2d 1155

(1969) should not apply to defendant's case or any other case decided prior to the date of the Austin decision. In Austin, the Court dealt with an instruction quite similar to the one given by the trial court below (Tr: 256) relating to the inference permitted by a jury when the suspect has fled from the police. The Austin Court criticized flight instructions in general, and said that if used at all, they should be more complete than the one given in the instant case. While they held such an instruction erroneous, they said it was harmless error where counsel had failed to object below. 414 F. 2d at 1158. As we noted in our initial brief, trial counsel for defendant in this case did object below.[4/]

The major case setting the guidelines for application of rulings retroactively is Linkletter v. Walker, 381 U.S. 618 (1965). There the Supreme Court held that Mapp v. Ohio, 367 U.S. 643 (1961) did not operate retrospectively upon cases finally decided prior to the Mapp Case. As to collateral attacks on a decision, the Linkletter court felt there was no prohibition against applying a rule retroactively to such cases, but felt each case must be decided on its own merits, and applied only when such rules affect the very integrity of the fact finding process. A year later, in Johnson v. State of New Jersey, 384 U.S. 719 (1966), the Court again

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4/ The Government has argued defendant objected only to the giving of a flight instruction; not to its actual wording. While technically true, it would seem that the general objection would serve the purpose of having the judge reconsider his instruction as a whole, thus serving as an objection to the wording also.

discussed the retroactivity of several criminal decisions in another collateral proceeding, and added a balancing test -- the disruptive consequences on the administration of justice against the reliability of the identification process. The Court ruled that Escobedo v. State of Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1965) should apply only to trials begun after they were decided, primarily because to apply them to cases on direct appeal would disrupt the criminal process by retrying or releasing many prisoners. See 384 U.S. at 731. This decision has been criticized.[5/] In any case, the Johnson reasoning is not applicable here. It has not been shown by the Government that there are any countervailing arguments against applying the Austin ruling to cases in this Circuit involving that issue.[6/] The fears spoken of by the Supreme Court in Johnson are not present here. Nothing in the Stovall case, which denied retroactivity to Wade, bolsters the Government's argument. In Stovall the Court was again concerned over disruption to the criminal process and felt cases on direct appeal did not warrent retroactive application. Here we have no such disruption. Thus there is no rationale for having a ruling apply to only those trials after Austin which would be contrary to what has generally been the law in the United States. For this reason the Austin decision should apply retroactively to the instant case.

5/ The Supreme Court, 1965 Term, 80 Harv. L. Rev. 123, 141 (1966).

6/ Neither brief cites more than five cases in the past five years in this Circuit.

CONCLUSION

Appellant respectfully requests this Court to reverse the decision of the Court below, and remand this case for a new trial for the reasons given.

/s/ Philip A. Fleming

Philip A. Fleming
Attorney for Appellant
(Appointed by this Court)

December 29, 1969